IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

GREENVILLE DIVISION

Wired Fox Technologies, Inc.,	)	
Plaintiff,	)	Civil Action No. 6:15-cv-00331-BHH
v.	)	
Christopher Estep, individually, and as Owner of Steel Lions, Inc.; Shane Cunningham, individually, and as Owner or Steel Lions, Inc.; and Steel Lions, Inc.,	)	**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF WIRED FOX TECHNOLOGIES INC. AND THIRD-PARTY DEFENDANT JEFFREY YELTON'S MOTION TO DISQUALIFY COUNSEL FOR DEFENDANTS CHRISTOPHER ESTEP AND STEEL LIONS, INC.**
Defendants.	)	
(Of Whom Christopher Estep is also Defendant-Counterclaimant)	)	
Christopher L. Estep,	)	
Third-Party Plaintiff,	)	
v.	)	
Jeffrey Yelton, Dwayne Mosley, and Jon Weatherill,	)	
Third-Party Defendants.	)	

Pursuant to Local Civil Rule 7.04 (D.S.C.), PLAINTIFF WIRED FOX TECHNOLOGIES, INC. (*hereinafter referred to as* "Wired Fox") and THIRD-PARTY DEFENDANT JEFFREY YELTON, (*hereinafter referred to as* "Yelton") by and through their undersigned counsel, hereby submit the following MEMORANDUM OF LAW in support of the MOTION TO DISQUALIFY COUNSEL David E. Rothstein, (*hereinafter referred to as* "Mr. Rothstein") counsel for Defendants Christopher Estep (*hereinafter referred to as* "Estep") and Steel Lions, Inc. (*hereinafter referred to as* "Steel Lions") in this dispute between two former business partners, Yelton, individually and as President of Wired Fox, and Estep, individually and as current owner/operator of Steel Lions.

INTRODUCTION

Plaintiff and Third Party Defendant Yelton's Motion to Disqualify comes after months of negotiation with Mr. Rothstein in attempt after attempt to resolve this matter without the Court's involvement. It is with much regret that attorney for Plaintiff and Yelton is forced to file its Motion and this accompanying memorandum in support. Of additional note, counsel would point out that she has attempted on multiple occasions as early as December of 2014 and as recent as several weeks ago to persuade Mr. Rothstein of Yelton's belief that he had served as his advisor and counselor in the previous underlying matter and was thus prevented from representing Estep against him in the present action.

In addition, in acting diligently to resolve this matter and in an abundance of caution in ensuring that this matter was given the greatest consideration and the greatest discretion, Plaintiff and Third Party Defendant's attorney requested that Mr. Yarborough, in his capacity as attorney for Third Party Defendant's Weatherill and Moseley, also discuss with Mr. Rothstein Yelton's adamant position that Mr. Rothstein cannot represent Estep against him. Mr. Yarborough has discussed the issue of the conflict with Mr. Rothstein on at least two occasions to no avail. Despite multiple requests by both Plaintiff's counsel and Third Party Defendant's counsel to reconsider his position in denying the existence of a conflict, Mr. Rothstein continues to maintain that his representation of Estep is appropriate. Therefore, counsel for Plaintiff and Third Party Defendant Yelton has no alternative but to file this Memorandum in Support of its Motion to Disqualify Counsel for Defendants Estep and Steel Lions.

ARGUMENT

This Motion to Disqualify and the Memorandum in Support of the same is based on two basic principles. The first is that Mr. Rothstein is constrained by a conflict of interests due to Third-Party Defendant Yelton's substantial participation during, and prominent pecuniary and professional interests in, a previous legal dispute in which Mr. Rothstein represented Estep. Important to note is that Yelton's participation in the previous dispute was elicited by Estep in conjunction with Mr. Rothstein. Yelton sincerely and reasonably believes that his substantial participation in the previous litigation involving Estep and Mr. Rothstein renders Yelton a "former client" under the South Carolina Rules of Professional Conduct (*hereinafter referred to as* "SCRPC") Rule 1.9 and the South Carolina Appellate Court Rule (*hereinafter referred to as* "SCACR") 407.

The second principle which disqualifies Mr. Rothstein's representation in the present case is that Yelton believes that Mr. Rothstein, as an Attorney-Witness in this case, cannot effectively nor equitably advocate for Estep and Steel Lions because Mr. Rothstein is a "necessary witness" as defined under Rule 3.7 of the SCRPC and SCACR Rule 407 and so cannot ensure a fair representation of personal facts known to him and at the same time zealously analyze the facts presented by witnesses before the court on behalf of Estep and Steel Lions. Therefore, Yelton and Wired Fox submit that Mr. Rothstein's representation of Estep and Steel Lions in the given matter

(1) creates a conflict of interests pursuant to SCRPC Rule 1.9 and SCACR Rule 407 and (2) irreparably hinders his capacity as a "necessary witness" pursuant to SCRPC Rule 3.7. Rules 1.9 and 3.7 of the SCRPC and SCACR Rule 407 have been expressly adopted by this Court. *See* Local Civil Rule 2.08, 2.09(h)(i)(2) (D.S.C).

STATEMENT OF FACTS

1. Mr. Rothstein acted as counsel for Estep during judicial proceedings filed by Intellisoft, Inc., (*hereinafter referred to as* "Intellisoft") including initial discussions of a dispute, culminating with the actual filing of an action by Intellisoft against Estep on August 7, 2014, and finalized by settlement on October 27, 2014. *See attached* Exhibit A.

2. As background, in March of 2014, David Peeples (*hereinafter referred to as* "Peeples"), co-owner of Intellisoft, a software development company, filed suit against Estep, who at the time was a majority shareholder. *Id.* Peeples alleged that Estep wrongfully appropriated funds from the company, deliberately sabotaged a client's website, and wrongfully copyrighted software believed to belong to Intellisoft, Inc. *Id.* In response, Mr. Rothstein, Counsel for Estep, filed counterclaims against Intellisoft and named Peeples as a third-party defendant.[1] *Id.* Yelton, on behalf of Plaintiff Wired Fox, agreed to reimburse Estep for partial legal fees associated with the legal action filed by Peeples on behalf of Intellisoft." *See attached* Exhibit B.

3. Yelton was particularly interested in the outcome of the Intellisoft Matter because he had contracted with Estep to improve upon the software he was currently using to provide products and services through his company Wired Fox to third party clients.

[1] The procedural posture of the Intellisoft Matter looks starkly similar to the matter before the Court today.

4. Throughout all negotiations, discussions and proceedings related to the Intellisoft Matter Mr. Rothstein maintained close communication with both Yelton and Estep. *See attached* Exhibit C. Such communication included Yelton sharing confidential information about Wired Fox's finances and client lists as well as its business prospects. Due to Mr. Rothstein's voluntary inclusion of current-Third-Party Defendant Yelton in his representation of Estep in the Intellisoft Matter, Mr. Rothstein will likely be called as a necessary fact witness to provide testimony that will be crucial to establish Estep's purported interest in Wired Fox as well as to evidence facts regarding Estep's claims that he accepted a substantially lower settlement amount in the course of mediation in the previous matter. As such, Mr. Rothstein should be precluded from representing Estep and Steel Lions.

5. Also important to this case is the background of Yelton's acquisition of Goddard Technologies, Inc. (*hereinafter referred to as* "Goddard") and subsequent change of its name to Wired Fox. Yelton incorporated Wired Fox Technologies, Inc. on January 12, 2012. *Id.* Yelton then issued a press release indicating that Wired Fox had successfully purchased and was the sole owner of a computer software product known as the "Goddard Code", purchased from Goddard. *Id.* ¶ 3. Yelton envisioned this newly acquired Goddard Code as Wired Fox's first step towards becoming a multifaceted computer software servicing company providing customizable products and services to third parties. *Id.* ¶ 5.

6. In 2013 Yelton was introduced to Estep, as a skilled computer programmer by a former Goddard employee. *Id.* ¶ 7. Yelton decided at that time, based on representation of Goddard employees, as well as Estep's representations, that Estep would be an integral component in improving the Goddard Code. *Id.* ¶ 8.

7. After meeting and negotiating terms for their working relationship, Estep and Yelton entered an independent contractor agreement (the "Agreement") tasking Estep with duties; (1) to provide support for existing and future software maintenance contracts for parties utilizing the newly acquired Goddard Code; and (2) to collaborate with Yelton to modify the Goddard Code to provide an improved version to be known as the "Blue Fox Code" to provide improved servicing for Wired Fox's customers' needs. *Id.* ¶ 9.

8. The Agreement made clear that Estep would be working under the direction of Yelton and would be responsible for fulfilling the contractor duties under the terms of the Agreement. *Id.* ¶ 10.[2]

9. Initially unknown to Yelton, while working under the terms of the Agreement, Estep remained a majority shareholder of Intellisoft. *See attached* Ex. A. On or about August 7, 2014 Intellisoft's co-owner Peeples filed suit against Defendant. *Id.* Intellisoft claimed the computer software that Estep was using in the creation of Blue Fox Code was a misappropriated asset of Intellisoft. *Id.*

10. Throughout the Intellisoft Matter Mr. Rothstein provided counsel to Yelton and Estep on a variety of issues, some of which are particularly central to the dispute in this lawsuit, including but not limited to the following:

a. Mr. Rothstein advised whether Estep was the rightful owner of the computer software that was created during Estep's tenure at Intellisoft. *See attached* Ex. C.

[2] *See* Independent Contractor Agreement, attached as Ex. D; *see also* Ex. C ¶ 9. The Alaskan Bid contained a contingency listing Yelton as a 100% owner of the software Blue Fox Code, and so this "50% ownership" would not be considered a payout after the owners received their payments.

b. Mr. Rothstein advised whether Estep's association with Wired Fox was in violation of Estep's duties owed to Intellisoft such that his association constituted an actionable breach of contract. *Id.* ¶ 13.

c. Mr. Rothstein advised Estep — and advised Yelton as well — as to whether Intellisoft would have any basis for a claim against Wired Fox due to Estep's association with Third-Party Defendant Yelton. *Id.* ¶ 14.

11. Following the commencement of the Intellisoft Matter in early Spring 2014, Estep informed Yelton about the lawsuit and requested not only that Yelton pay Estep pursuant to the terms of the Agreement but also that Yelton reimburse Estep for any attorney's fees owed to Mr. Rothstein. *Id.* ¶ 12.

12. Yelton had a direct interest in the disposition of the Intellisoft Matter because Estep was in the process of modifying the Goddard Code to create the Blue Fox Code for Wired Fox at the time the lawsuit was filed; and, if Intellisoft was successful in its action, Estep would not be able to complete the improvement to the Goddard Code, known as the Blue Fox Code. *Id.* ¶ 13. Therefore, due to his common interest in the successful outcome of the pending action and his own interests in Estep's fulfilling his obligations under the Agreement, Yelton acquiesced and loaned Estep funds for Mr. Rothstein's fees. *Id.* ¶ 13.

13. On August 2, 2014 Estep informed Yelton that Yelton needed to limit his exposure in the Intellisoft suit and only pay Mr. Rothstein between $50,000.00 and $100,000.00 for the representation of Estep. *See attached* Exhibit B. Estep further stated that when Yelton decided he (Yelton) was no longer paying, the (Intellisoft) case would be over. *Id.* For approximately two-and-a-half months, beginning August 7, 2014, when Intellisoft first asserted formal claims against

Estep, until October 27, 2014, when the presiding court approved a settlement agreement in favor of Estep, Yelton loaned funds to Estep for the payment of Mr. Rothstein's defense fees.

STANDARD OF REVIEW

This Court has historically recognized its "duty to maintain the highest ethical standards of professional conduct to ensure and preserve trust in the integrity of the bar." *Latham v. Matthews*, C.A.: 6:08-cv-02995-JMC, C.A.: 6:08-cv-03183-JMC (D.S.C. Jan. 06, 2011) (quoting *In re Asbestos Cases*, 514 F.Supp. 914, 925 (E.D. Va. 1981)). The South Carolina Rules of Professional Conduct govern the practice of law and ethical standards in the federal District Court for the District of South Carolina. *See* Local Civil Rule 83.I.08 (D.S.C.), RDE Rule IV(B) ("The Code of Professional Responsibility adopted by this Court is the South Carolina Rules of Professional Conduct (Rule 407 of the South Carolina Appellate Court Rules) adopted by the Supreme Court of the State of South Carolina . . . ."). "Violation of any provision of the South Carolina Rules of Professional Conduct" qualifies as sanctionable misconduct. *See* RDE Rule V(H)(2); *see also Clinton Mills, Inc. v. Alexander Alexander, Inc.*, 687 F. Supp. 226, 228 (D.S.C. 1988) ("It is the court's responsibility to use its disqualification power to see that those who practice before the court adhere to the South Carolina Code [of Professional Responsibility].").

The moving party has the burden of proof in moving to disqualify, and that burden "is a high one." *See In re Duncane Gas Grills, Inc.*, 320 B.R. 312, 318 (Bankr. D. S.C. 2004). Although the standard to be met by the moving party in establishing the appropriateness of disqualifying the opposing party's counsel is a high one, the Court should decide these motions on a case-by-case basis. *See id.* 318-19. This Court in *Clinton Mills* stated that in the District of South Carolina "a motion to disqualify is a matter subject to the court's general supervisory authority to ensure fairness to all who bring their case to the judiciary for resolution." *Clinton Mills*, 687 F. Supp. at 228.

In *Donaldson v. City of Walterboro Police Dep't*, the Fourth Circuit granted the defendants' motion to disqualify the plaintiff's counsel for a conflict of interests with current clients, recognizing that, though doing so deprived the plaintiff of his chosen counsel, the disqualification was proper because the courts must remain "mindful of its responsibilities to uphold the South Carolina Rules of Professional Conduct." *Donaldson v. City of Walterboro Police Dep't*, C.A.: 2:06-cv-02492-PMD (D.S.C. 2008); *see also Clinton Mills*, 687 F. Supp. at 228.

DISCUSSION

I. Mr. Rothstein is in violation of Rule 1.9 of the South Carolina Rules of Professional Conduct because he advocates for Defendant Estep against former client Third-Party Defendant Yelton in a substantially related matter for an interest materially adverse to Yelton's interest such that Mr. Rothstein cannot represent Estep against Yelton within the same proceeding without being conflicted.

The first issue presented in this MOTION TO DISQUALIFY Mr. Rothstein is whether Mr. Rothstein's representation of Estep creates an inherent conflict of interest prejudicial to Yelton. The South Carolina Rules of Professional Conduct, Rule 1.9 "Duties to Former Clients" states in relevant part:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person *in the same or a substantially related matter* in which that person's interests are *materially adverse to the interests of the former client* unless the former client gives informed consent, confirmed in writing.
> …
> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter *shall not thereafter:*

> *(1) use information relating to the representation to the disadvantage of the former client* except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

S.C. Rules of Professional Conduct R. 1.9(a), (c) (2015) (emphasis added). As such, a motion to disqualify Mr. Rothstein turns on (1) whether an attorney-client relationship formed between Yelton and Mr. Rothstein such that Yelton is protected as that of a "former client" under SCRPC Rule 1.9 and SCACR Rule 407; (2) whether the above-captioned matter is "substantially related" to the Intellisoft Matter, which gave rise to the creation of the original attorney-client relationship; and (3) whether Estep's interests are materially adverse to Third-Party Defendant Yelton's.

In assessing whether counsel should be disqualified on grounds of conflict of interest and breach of confidentiality, this Court has also applied a second variation of the above test; holding that under circumstances of successive representation, a party must show two conditions are met: first, movant must show that the attorney in his previous position could have received information from the former client that the former client might reasonably assume the attorney would withhold from his present client[3]; and second, movant must show that the "Substantial Relationship" test is met, as adopted in *Latham v. Matthews*.[4] The "Substantial Relationship" test turns on (1) whether an attorney-client relationship existed between Yelton and Mr. Rothstein; and (2) whether the

[3] The *Latham* court cites the Second Circuit's 1977 opinion *Allegaert v. Perot*, 565 F.2d 246 (2d.Cir. 1977) for this first element.

[4] Though the *Latham* court recognized that the South Carolina Rules of Professional Conduct are adopted by this court, it eschewed the standards set out by the Rules and its comments and instead applied common law of the Eastern District Court of Virginia and the Second Circuit Court to establish the "Substantial Relationship" Test. For this memorandum, the standard set forth in the South Carolina Rules of Professional Conduct will be first addressed element-by-element, and then the *Latham* court "Substantial Relationship" test (with similar elements to the SCRPC) will follow.

former through this matter does not involve the "same transaction" as the Intellisoft Matter, and only perhaps involves the same legal dispute.[5] There is a decisively substantial risk that the confidential factual information that was shared by Yelton with Estep and Mr. Rothstein will be used by Estep and Mr. Rothstein to materially advance Defendants' position in this proceeding. During the Intellisoft Matter, Yelton disclosed factual and confidential information to Mr. Rothstein induced solely by Mr. Rothstein's assurances that he would be forever barred from representing Estep or Yelton against one another in any future legal proceedings. *Id.* ¶ 15. To provide adequate representation for Estep in the Intellisoft Matter, Mr. Rothstein requested that Yelton disclose proprietary information including, but not limited to, confidential financial information regarding current-Plaintiff Wired Fox as well as proprietary information relating to the use and marketing of Blue Fox Code. *Id.* Because of the nature of these disclosures, both Defendant Estep and Mr. Rothstein became aware of Yelton's plans for the future of Blue Fox Code and obtained proprietary information about current and future customers as well as the personal financial information of Yelton. *Id.*

Yelton's disclosure of the intimate inner workings of his business during the Intellisoft Matter materially advances Estep's position in this subsequent matter by allowing for sharp litigation practices. Yelton is reasonable in his belief that confidential information shared regarding his finances, business practices and business prospects would likely be used to materially advance Defendant Estep's position in these proceedings. Despite the fact that the previously shared confidential information regarding Yelton's personal financial information, as well as his proprietary interests and goals for Wired Fox and the Blue Fox Code was obtained in a voluntary fashion during the course of litigation between non-adverse parties, this relinquishment of confidential information was not accidental nor officious. In fact, if anything, it evidences the interactive and dynamic role Yelton played in the Intellisoft Matter.

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[5] *Cf.* the *Latham* "Substantially Related" Test discussion, *infra.*

Yelton's reasonable belief that his disclosure of confidential information - not otherwise obtainable but for the previous representation by Mr. Rothstein in the previous matter - will likely be used to advance Estep's and Steel Lions' position against Yelton in the present dispute, and supports Yelton's position that these matters are "substantially related" such that the conflict arises between the interests present in the two litigated matters.

A. Under Rule 407 of the South Carolina Appellate Rules, an attorney-client relationship exists between Third-Party Defendant Yelton and Mr. Rothstein.

Determining whether an attorney-client relationship exists is a fact-intensive inquiry. *In re Ducane*, 320 B.R. at 319. Rule 407 of the South Carolina Appellate Rules ("SCACR") provides:

> Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. *See* Rule 1.18 *Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.*

Rule 407, SCACR (emphasis added). The Court in *Clinton Mills, Inc. v. Alexander Alexander, Inc.* stated that in the District of South Carolina "a motion to disqualify is a matter subject to the court's general supervisory authority to ensure fairness to all who bring their case to the judiciary for resolution."[6] 687 F. Supp. at 228. Therefore, SCARC Rule 407 read with *Clinton Mills* indicates that the Court has the discretion to consider the existence or absence of a retainer; however, disqualification of an attorney is undeniably a multi-faceted analysis of fairness resting on hard facts and balancing the circumstances surrounding the proceedings.

Generally SCRPC Rule 1.8 "Conflict of Interests: Current Clients" enumerates specific rules about conflicts of interests with current clients that would require disqualification. Under SCRPC Rule 1.8(f), it is not enough to create a conflict of interest or even the attorney-client relationship between the attorney and a third-party payor if the third-party simply pays the compensation for a client.[7] The fact here is that Yelton's level of involvement with Estep and Mr. Rothstein in the Intellisoft Matter created a dynamic that extended the relationship between Yelton and Mr. Rothstein beyond the confines of attorney (Rothstein) - client (Estep) and disinterested-third-party (Yelton) and therefore outside of the representative capacity of the basic third party agent payor that SCRPC Rule 1.8(f) contemplates.

On August 7, 2014 Intellisoft initiated legal proceedings against Estep shortly after Estep associated with Plaintiff Wired Fox. Here, as contemplated by SCRPC Rule 1.8, there arose a situation where a third-party (Yelton) funded the defense of a party to an action (Estep). However, the subsequent combined voluntary actions of Mr. Rothstein and Estep are the key factors that render Mr. Rothstein's current representation of Estep against Yelton improper.

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[6] *See also* S.C. Rule of Prof'l Conduct R. 1.8(f) (2015). Similarly the District Court for North Carolina found that although a lawyer's duty of loyalty and independent judgment to a client is not burdened by a third party's rendering payments for the attorney's services, the appropriateness of the disqualification of counsel when such a situation occurs must be determined on a case-by-case basis. *See Capacchione v. Charlotte-Meklenburg Bd. of Educ.*, 9 F. Supp. 2d 572, 579 (W.D.N.C 1998).

[7] An attorney who receives compensation from a third party 1) without the client's informed consent, 2) with some indicia of interference with the lawyer's independence of professional judgment or with the client-lawyer relationship, or 3) in a manner that fails to protect the client's confidential information runs the risk of creating a relationship beyond the confines of the existing attorney-client relationship. *See id.*

First, although Yelton never personally solicited Mr. Rothstein for legal services, the attorney-client relationship existed based on certain *circumstances and facts* as contemplated by Rule 407, SCACR. Foremost, throughout Mr. Rothstein's representation of Estep against Intellisoft, Yelton was made privy to what would otherwise be considered privileged attorney-client communications both in person and electronically. *See attached* Ex. C, ¶ 15. Yelton was included in these confidential communications for two reasons: (1) Yelton was funding Mr. Rothstein's defense of Estep and (2) Yelton shared a common interest so central to the successful disposition of the case that Mr. Rothstein sought to assure Yelton that Wired Fox's interests were being best served in his representation of Estep. *Id.* ¶ 15.

Another and perhaps even more telling fact evidencing Mr. Rothstein and Yelton's attorney-client relationship is Mr. Rothstein's own admission in a conversation with Yelton in which Mr. Rothstein assured Yelton that he (Rothstein) would never be able to represent Estep or Yelton in a lawsuit between the two parties in the future. *Id.* ¶¶ 15, 18.

Second, not only was Yelton called upon to aid in Estep's defense but - based on certain communications between Yelton and Estep - it appears from the circumstances that Yelton was ultimately in control of how and when the case would proceed, if at all. *Id.* ¶ 16. A deluge of emails among Yelton, Mr. Rothstein and Estep makes clear that Yelton's involvement in the Intellisoft Matter reached far beyond being merely a passive financer of Estep's defense as envisioned under SCRPC Rule 1.8. In fact, Estep stated in one of these communications to Yelton, "As far as the lawsuit [i.e., the Intellisoft Matter] goes, just limit your exposure to a certain amount (say 50 or 100) and tell David R. (David Rothstein) when that money runs out you're done." *See attached* Ex. B; *see also attached* Ex. C, ¶ 16.

These facts, including the extent of Yelton's communications with Mr. Rothstein and the degree of control constructively given to Yelton over the Intellisoft Matter against Estep, illustrate the very scenario contemplated by SCACR Rule 407 in which the attorney-client relationship is established entirely as a matter of fact and circumstance.

In the present case, pursuant to SCRPC Rule 1.9[8] and SCACR Rule 407,[9] the facts support a finding that an attorney-client relationship existed between Mr. Rothstein and Yelton. Therefore, Mr. Rothstein must now be prohibited from again Estep, this time against Yelton, because of the conflicting interests created by Mr. Rothstein's previous representation of Yelton's interests.

B. The present case is "substantially related" to the matter that created by its circumstances the attorney-client relationship between Third-Party Defendant Yelton and Defendant's Counsel Rothstein.

The second inquiry as to Mr. Rothstein's disqualification for conflict of interests under SCRPC Rule 1.9 asks whether a "substantial relationship" exists between the Intellisoft Matter during which Mr. Rothstein and Yelton's attorney-client relationship formed and the current matter between Mr. Rothstein's former clients Yelton and Estep. Comment three of SCRPC Rule 1.9 sets out the standard: Matters are "substantially related" if (1) "they involve the same transaction or legal dispute" or if (2) "there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." S.C. Rules of Prof'l Conduct R. 1.9 cmt. 3; *see also Browder v. Ross Marine, LLC,* Docket No. 2005-UP-613, 2005 WL 7084981, at *2 (S.C. Ct. App. Dec. 8, 2005) ("In determining whether the matter is 'substantially related,' one should consider, among other things, whether the affected lawyer would have or reasonably could have learned confidential information in the first representation that would be of significance in the second.") (internal citations omitted).

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[8] See *supra* Part I for RPC Rule 1.9 text.
[9] See *supra* Part I.A. for SCACR Rule 407 text.

i. Defendant Estep's interests are materially adverse to Third-Party Defendant Yelton's.

The aforementioned facts indicate the directly adverse interests of Estep to those of Yelton in the present case. Estep, by and through his counsel Mr. Rothstein, seeks a disposition of this matter wholly contrary to that sought by Yelton. The two adverse parties, once working together, now avail themselves of the court to settle a property dispute affecting Wired Fox's business reputation as well as Yelton's ownership of software that is a fundamental asset to his corporation.

ii. Yelton shared confidential information with Mr. Rothstein during the Intellisoft Matter resulting in the existence of an attorney-client relationship whereby the former representation is "substantially related" to the current controversy.

Under the *Latham v. Matthews* standard for disqualification of counsel due to conflict of interests, movant must first show that the attorney in his previous position could have received information from the former client that the former client might reasonably assume the attorney would withhold from his present client.[10] As discussed above, during the Intellisoft Matter, Yelton disclosed factual and confidential information to Mr. Rothstein induced solely by Mr. Rothstein's assurances that he would be forever barred from representing Estep or Yelton against one another in any future legal proceedings. *See attached* Ex. C, ¶¶ 15, 18. Yelton disclosed proprietary information including, but not limited to, confidential financial information regarding current-Plaintiff Wired Fox as well as proprietary information relating to the use and marketing of Blue

[10] The *Latham* court cites the Second Circuit's 1977 opinion *Allegaert v. Perot*, 565 F.2d 246 for this first element.

Fox Code. *Id.* Because of the nature of these disclosures, both Estep and Mr. Rothstein became aware of Yelton's plans for the future of Blue Fox Code and obtained proprietary information about current and future customers as well as the personal financial information. This confidential information obtained in a previously trusting relationship is of the type that a former client would reasonably assume his former attorney would withhold from another client. However, in litigating the claims at hand such as Estep's Conversion of the Blue Fox Code and Intentional Interference with Business Relations, the confidential information previously volunteered by Yelton will likely not be withheld in Mr. Rothstein's advisement and advocating for Estep.

The second test as adopted in *Latham v. Matthews* is that movant must show that the "Substantial Relationship" test is met. The "Substantial Relationship" test turns on (1) whether an attorney-client relationship existed between Yelton and Mr. Rothstein; and (2) whether the former representation is "substantially related" to the current controversy. *See Latham*, C.A. 6:08-cv-0295-JMC, at 4. The *Latham* court does not set out a specific standard for how to identify the attorney-client relationship. One reason may be because the denial of the motion to disqualify counsel in *Latham* turned on the court's finding that the movant's *unasserted claims* and "tenuous assertion of conflict of interest" (based on the second part of the test – the "substantially related" test) were too speculative, and so the court did not reach the question of the existence of an attorney-client relationship. *See generally id.*. The *Latham* court defines "substantially related" as "identical" or "essentially the same." *Id.* at 5 (citing *Tessier v. Plastic Surgery Specialists, Inc.*, 731 F. Supp 724 (E.D. Va. 1990)). Though this matter does not involve the "same transaction" as the Intellisoft Matter,[11] and only perhaps involves the same legal dispute, here, the ownership of

[11] As required under S.C. Rules of Prof'l Conduct R. 1.9 (2015).

the software, the interference with business relations, and the control of the customer base is at issue, and those issues were also factually presented in the Intellisoft Matter. *See attached* Ex. A. Under this standard, the Intellisoft Matter and the present case are substantially related due to the nearly identical factual similarity and legal contentions as well as the confidential information passed between the three parties that would fulfill similar purposes in the past litigated case as it does in the above-captioned case.

II. Mr. Rothstein is a "necessary witness" for the present proceedings and therefore is barred from acting as an advocate for Estep and Steel Lions during the same proceedings.

The second issue in this Motion to Disqualify is whether Mr. Rothstein is a Necessary Witness and so precluded from advocating for Estep and Steel Lions. Rule 3.7 of the SCRPC and SCACR Rule 407[12] directs the Court on the issue of when a party seeks to be represented by an attorney who will also be a necessary witness in the same proceedings. Rule 3.7 of the SCRPC provides the restrictions regarding the attorney's participation in a trial as a witness:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.
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> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 [Conflict of Interest: Current Clients] or Rule 1.9 [Duties to Former Clients].

[12] See *supra* Part I.A. for SCACR Rule 407 text.

S.C. Rules of Prof'l Conduct R. 3.7 (2015). Importantly, comment 4 explains that the exception within Rule 3.7(a) (3) requires the court to balance the interests of the client and the opposing party. As stated in *Clinton v. Mills:*

> If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

687 F. Supp. at 229.

A. "Necessary Witness": Interpreted

Rule 3.7 of the SCRPC[13] and SCACR Rule 407[14] do not define with specificity the term "necessary witness". The Court in *Clinton Mills* adopted a flexible test for determining when an attorney can be a witness, "requiring a complete examination of the facts of each case before a determination is made as to counsel's competence." *Id.* at 230. Rule 3.7 of the SCRPC remarks how "[c]ombining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.[15] Accordingly, disqualification of an advocate may be appropriate where counsel is a necessary witness for the opposing party, even where his testimony would be prejudicial to his own client. *Id.* If SCRPC Rule 3.7 provides any guidance, the distinction should be that if there is an objection that the fact-finding tribunal will not be able to distinguish between the lawyer's presentation of proof as he personally witnessed the events and the lawyer's analysis of proof as witnessed by others, that objection is proper and the opposing party as well as the client may suffer prejudice.[16]

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[13] *See id.*
[14] See *supra* Part I.A. for SCACR Rule 407 text.
[15] RPC R. 3.7 cmt. 1.

B. The Exception in Rule 3.7(a)(1) does not apply to Mr. Rothstein; His proposed testimony relates to a contested issue.

Rule 3.7(a)(1) of the SCRPC provides an exception to the generally accepted rule that an attorney who is representing a client at a judicial trial is not permitted to also be a witness at the same trial: The attorney may so witness when the proposed testimony of the attorney-witness does not relate to a contested issue. SCRPC R. 3.7(a) (1).

The anticipated testimony of Mr. Rothstein in the present case relates directly to contested issues including what Estep's professional relationship was with Plaintiff Wired Fox and whether Estep violated the terms of his Agreement when he unilaterally copyrighted Blue Fox Code. Estep alleges that he declined a greater amount in settlement in the Intellisoft Matter, to which Wired Fox was named as a party. The only other witness to the negotiation proceedings in the Intellisoft Matter is Mr. Rothstein. Furthermore, any evidence that Defendant Estep and Yelton had conversations about the effect of the Intellisoft Matter with Mr. Rothstein will need to be produced by the third-party witness, Rothstein. Though those conversations are certainly subject to the attorney-client privilege, as noted above, Yelton is a former client of Mr. Rothstein and therefore holds the privilege and may so waive it to allow Mr. Rothstein to testify as to relevant portions of

[16] RPC R. 3.7 cmt 2. The issue of whether Mr. Rothstein is providing truthful testimony is not the crux of determining whether he is necessarily disqualified as an advocate for Defendants Estep and Steel Lions, Inc. Rather, the fact-finding of whether Yelton and Wired Fox reasonably believed that the relationship between Defendant Estep, Plaintiff Wired Fox and Yelton was such that Estep's actions in this matter were wrongful is the key consideration of whether Mr. Rothstein's personal testimony can provide proof that will aid the finder of fact. If so, the guidance of Comment 2 to Rule 3.7 shows that the purpose of disqualifying a necessary Attorney-Witness is to avoid clouding the factual issues.

the content of those conversations.[17] The capacity of Mr. Rothstein to fully advocate for Defendants in analyzing key facts is compromised by the role Mr. Rothstein must play in providing testimony relating to these contested issues. Therefore, this exception to Rule 3.7 does not apply; Mr. Rothstein should be considered as having uniquely personal proof about centrally contested issues. As such, Mr. Rothstein's continued representation of Defendants is improper.

C. The Exception in Rule 3.7(a)(2) does not apply to Mr. Rothstein; His proposed testimony relates to personal knowledge of issues central to the resolution of this matter and not to issues regarding Counsel's legal services.

Rule 3.7(a) (2) of the SCRPC also provides an exception to the generally accepted rule that an attorney who is representing a client at a judicial trial is not permitted to also be a witness at the same trial: The attorney may so witness when the proposed testimony of the attorney-witness relates to the nature and value of legal services provided in the case. SCRPC R. 3.7(a) (2).

Like Rule 3.7(a) (1), this rule's application in the present matter is relatively straightforward. The proposed testimony of Mr. Rothstein does not relate exclusively to the nature and value of Mr. Rothstein's services to Estep in the Intellisoft Matter nor the present matter. Rather, Yelton and Wired Fox intend to elicit testimony from Mr. Rothstein regarding the terms and conditions placed on Estep relating to his position with Plaintiff Wired Fox, the terms of the settlement negotiations for the Intellisoft Matter, and the conversations between Yelton, Estep and

[17] *See Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1174 (D.S.C. 1974) ("An established exception to the attorney-client privilege is that the privilege does not apply to any subsequent dispute between jointly represented clients."). Wired Fox and Yelton's argument that Mr. Rothstein is a necessary witness because Mr. Yelton will elicit testimony from Mr. Rothstein about the confidential discussions during the Intellisoft Matter does not conflict with Yelton's contention that he will suffer prejudice if Rothstein represents Estep. The difference is that Mr. Yelton will be able to control the content of the confidential discussions as well as the use of that evidence when Mr. Rothstein testifies. If Mr. Rothstein is allowed to represent Defendant Estep against Mr. Yelton, his having Yelton's confidential information previously confided as a former client allows Defendants a material advantage in the current litigation with no reasonable expectation that Mr. Rothstein would withhold such information.

Mr. Rothstein – facts only known by Mr. Rothstein, Estep and Yelton and therefore facts likely to be disputed in a he-said-he-said manner unless Mr. Rothstein testifies.

Therefore, because Mr. Rothstein's proposed testimony relates to matters distinct from the nature and value of his legal services, this exception is inapplicable and thus renders Mr. Rothstein's continued representation of Estep and Steel Lions improper.

D. The Exception in Rule 3.7(a) (2) does not apply to Mr. Rothstein; Disqualification would not work substantial hardship on Counsel's Client Estep and Steel Lions.

The "substantial hardship" exception to SCRPC Rule 3.7 "recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party." SCRPC R. 3.7 cmt. 4. The advisory committee's comment on Rule 3.7 provides that the court will look to five factors in assessing the interest of the parties, those factors being: (1) whether the opposing party is likely to suffer prejudice depends on the nature of the case; (2) the importance and probable tenor of the lawyer's testimony; (3) the probability the lawyer's testimony will conflict with that of other witnesses; (4) the effect the lawyer's disqualification will have on client; and (5) the probability that one or both parties could reasonably foresee that the lawyer would be a witness. Rule 3.7 cmt. para. 4.

i. Yelton and Wired Fox will likely suffer prejudice if Mr. Rothstein is permitted to serve at trial as counsel for Estep and Steel Lions.

As discussed above in establishing Yelton's identity as a former client, Mr. Rothstein was presented with confidential information by Yelton relating specifically to Blue Fox Code and the business relations between Yelton, Wired Fox and Estep, such information which will be central in the issues forming the basis of the present litigation. Allowing Mr. Rothstein to continue in his representative capacity would greatly prejudice Yelton and give Estep a tactical advantage that could not be overcome by Yelton. Yelton's surrender of access to the intimate inner workings of his business during the Intellisoft Matter materially advances Estep's position in this subsequent matter by allowing for sharp litigation practices. It would be unreasonable for Yelton to believe that confidential information about his finances, business practices and business prospects so imparted would not be used to materially advance Estep's position in these proceedings.

ii. Mr. Rothstein's testimony is so important as to render his testimony necessary.

On numerous occasions Mr. Rothstein was the only other party present during conversations between Yelton and Estep relating directly to Estep's position with Wired Fox and the parameters of said affiliation. Mr. Rothstein was also present during conversations between Yelton and Estep relating to the creation and use of Blue Fox Code. Because Yelton's and Estep's testimony will inevitably differ substantially, the only party that will have the ability to shed any light on facts central to the resolution of this matter is Mr. Rothstein thus rendering his testimony invaluable.

iii. The probability that Mr. Rothstein's testimony will conflict with the testimony of Yelton, Estep or both is very likely.

Mr. Rothstein was the only other party present during the numerous conversations that took place between Estep and Yelton, relating to issues central to this case. Mr. Rothstein's testimonywill likely conflict drastically with Yelton's and possibly Estep's testimony, thus giving this Court a better chance to justly dispose of this matter. Furthermore, because Wired Fox and Estep were named parties in the settlement in the Intellisoft Matter, and Mr. Rothstein was one witness to those negotiations, his testimony will likely conflict between the testimony of one or both of these adverse parties.

iv. The negative effects on Estep and Steel Lions caused by the removal of Mr. Rothstein as counsel will be minimal.

Although Estep and Steel Lions will be deprived of the counsel of their choosing, the procedural posture of the parties at this juncture (pre-discovery) provides Estep adequate time to find substitute counsel. Estep has previously pointed out that procedural posture alone is no grounds for prejudice because, "Of course, discovery cannot commence in federal court until the Court issues its preliminary scheduling order." Def. Mem. in Opp'n to Pl.'s Mot. to Set Aside Entry of Default as to Countercl., at 4. However, the necessity of counsel is most apparent in the discovery stage of litigation. In fact, South Carolina recognizes and permits counsel, even in light of disqualification, to remain involved in the preparation and pre-trial matters related to Estep's and Steel Lions' case. *S.C. Bar Ethics Adv. Op. #05-06.* Therefore, the negative effects of disqualification on Estep in the present case would be nominal. Additionally, Mr. Rothstein's testimony may require independent counsel to cross-examine the witness on Estep's behalf, in which case it may cause prejudice to Estep to allow Mr. Rothstein to act as Attorney-Witness in this case.

v. Both parties could have reasonably foreseen that Mr. Rothstein would be a witness.

In the present matter, not only could all parties have foreseen the likelihood of Mr. Rothstein being called as a witness, but all parties likely *knew* Mr. Rothstein would be a necessary witness in the event of litigation between Wired Fox, Yelton and Estep. The Intellisoft Matter involved the exchange of information between parties that are all parties to the above-captioned case. Mr. Rothstein's testimony, as noted above, is genuinely needed, and so its necessity cannot be construed as a tactical maneuver but rather as a reasonably foreseeable necessity for the litigation at hand.

The present motion is filed in a timely and reasonable manner. At this junction, no formal discovery proceedings have commenced nor are the parties working under a scheduling order. Therefore, the facts and circumstances as set forth above tend to indicate that both parties not only could have known but actually knew of the likelihood that Estep's counsel would be called as a witness.

CONCLUSION

For the aforementioned reasons, Plaintiff Wired Fox Technologies, Inc. and Third-Party Defendant Jeffrey Yelton request that the Court disqualify David E. Rothstein as counsel for Defendants Estep and Steel Lions from the above-captioned matter.

Respectfully submitted this 12 day of May, 2015,

s/ Kimberly Thomason

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